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IN THE

Supreme Court of the United States

OCTOBER TERM 1943.

No. 715

THE DIXIE MARGARINE COMPANY,
Petitioner,

vs.

A. H. SHAEFER, Formerly Deputy Collector of Internal Revenue for the District of Tennessee,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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vs.

A. H. SHAEFER, Formerly Deputy Collector of Internal Revenue for the District of Tennessee,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

Your petitioner, The Dixie Margarine Company respectfully prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered in the above cause December 1st, 1943, affirming the judgment of the United States District Court for the Western District of Tennessee, Western Division entered December 7th, 1942.

Opinion Below.

The District Court filed no opinion. The opinion of the Circuit Court of Appeals is reported in 139 F. (2) 221.

Jurisdiction.

The jurisdiction of this court is invoked under Sec. 240 (a) of the Judicial Code, as amended.

Statute Involved.

The statute whose construction is involved in this case is Sec. 3226 R. S. as amended by the Revenue Act of 1932, Ch. 209, 47 Stat. 169, Sec. 1103a, which reads as follows:

> "Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit shall have been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty or sum has been paid under protest or duress. No suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which suit or proceeding relates."

Questions Presented.

The question presented is whether it was the intention of Congress in enacting Section 3226 R. S. that there should be no exceptions to it and whether it should apply without variation in any respect in all cases, particularly where an executive officer wilfully and fraudulently falsified a statute and published the falsified version as a Regulation of his Department for the information of all parties concerned, intending that these persons should rely upon it as the law, thus concealing its falsity for many years, and under such falsified version collect illegally, large sums of money, and then after the time prescribed by such section for filing a claim for refund had expired, set up such section as a defense of the retention of such money by the government.

The question presented is whether in the case of actual fraud by a government official he becomes a constructive trustee for the taxpayer, and whether in such case in equity the analogy of the Statute of Limitations applies and equity cannot relieve.

Statement.

The facts of the case as set out in the bill of complaint (Rec. 2-11) very briefly are as follows: Petitioner, a Tennessee corporation in 1923 began the manufacture of a food product consisting of vegetable oils, salt, water, and skimmed milk, with or without coloring matter which is now commonly known as oleomargarine.

Respondent, a Deputy Collector of Internal Revenue at Memphis, Tenn., in charge of the sale of Revenue stamps, when called upon by the President of Petitioner told him that the product was oleomargarine, and the Petitioner

must secure a license as a manufacturer and also place stamps on all of the product manufactured and sold, and that a failure to do so would subject Petitioner to fines, imprisonment, and a seizure of the factory and goods. Respondent at that time gave Petitioner a copy of Regulations No. 9 of the Bureau of Internal Revenue and instructed that the business must be governed in accordance therewith. The factory was inspected by Revenue officials every three months, and a compliance with Reg. No. 9 required.

To avoid these penalties and solely because of such threats, Petitioner under duress and compulsion paid to Respondent large sums of money between 1923 and 1931. On Nov. 30, 1929 and on Sept. 14, 1931, Petitioner filed claims for refund of such sums which claims were wrongfully, illegally and fraudulently rejected by the Commissioner of Internal Revenue, and to protect its rights Petitioner filed a suit in the District Court of Tennessee for the recovery of such amounts. Petitioner cooperated with others in the industry and filed a suit entitled *Standard Nut Margarine Company of Florida* v. *Miller, Collector,* in which the District Court granted an injunction against the further collection of such amounts. The case was appealed to the Circuit Court of Appeals for the fifth circuit and that court sustained the decision of the District Court, (49 F (2) 79), and held such products not taxable as oleomargarine and stated that the Commissioner of Internal Revenue knew they were not taxable under the law and that his action in holding them so taxable was so unsubstantial as to be frivolous and was taken in contemptuous disregard of existing court decisions and was an attempt to coerce the payment of money illegally and that the holding that it was taxable was so arbitrary that it amounted to a

mere administrative fiat and that the claim that the product was taxable was merely colorable and a frivolous pretense that it was his official duty. The court further held that the Plaintiff was entitled to protection in equity and sustained the injunction restraining any further attempts on the part of the Commissioner to tax such products as oleomargarine.

The defendant appealed to this court and in *Miller* v. *Standard Nut Margarine Company of Florida*, 284 U. S. 498 this court upheld the decision of the Circuit Court of Appeals, decided such products were not taxable, that there was no law taxing them, that the Commissioner knew there was no such law and that his action in taxing them was without warrant, arbitrary, oppressive and without force.

The Commissioner then refunded all amounts for which claims for refund had been filed within the provision of Sec. 3226 R. S. but refused to return amounts paid in by Petitioner for the period preceding that covered by the claims filed which went back only four lears to 1925. Petitioner then filed a suit in the United States Court of Claims for the amount of $87,412 which had been paid in prior to that time but that court held it had no jurisdiction because no claim for refund had been filed in accordance with Sec. 3226 of the Revised Statutes.

From 1935 to the time of the filing of this suit Petitioner was engaged in constant litigation with the Bureau of Internal Revenue with respect to some part of these transactions. When that litigation was completed this suit was filed in equity on the theory that Respondent, in demanding, taking and retaining this money had deprived

Petitioner of its property without due process of law and had taken its private property for public use without just compensation and asked that the Respondent be declared a constructive trustee, for an accounting and restitution, further alleging that Respondent wilfully and fraudulently represented to Petitioner that such products were taxable as oleomargarine, at the time well knowing that such representations were false, and wilfully intended that Petitioner should pay over to him the said sum of $87,412. That Petitioner believed such representations of the Respondent to be true and as a result thereof paid over to the Respondent the said sum, the receipt of which gave him no right or title, but which was the property of Petitioner.

The Respondent filed a motion to dismiss (Rec. 12-14), which was sustained by the District Court (Rec. 15). No opinion was written. An appeal was taken to the Circuit Court of Appeals for the sixth circuit (Rec. 16). That court sustained the decision of the District Court on the ground that there had been no claim for refund in compliance with Sec. 3226 R. S.; that the facts as summarized above were not sufficient to constitute Respondent a constructive trustee, or to establish such fraud or concealment as are necessary as an exception to the running of the statute of limitations, and finally that in the absence of fraud equity can give no relief where the statute has tolled, and that a court of equity was bound to apply the theory of an analogy to the Statute of Limitations.

Reasons for Granting the Writ.

The question is one of gravity and importance in that a section of the statutes of the United States, Sec. 3226 R. S. whose purpose as construed by this court is for the convenience of the Commissioner of Internal Revenue in advis-

ing him of the demands or claims intended to be asserted, is being used to enable the government to retain large sums of money which the Commissioner coerced from citizens by his fraudulent and illegal act of falsifying a statute of the United States, (Act of Aug. 2, 1886 as amended) and concealing its falsification for a great many years by publishing the falsified section as a Regulation of his department, and then asserting said Sec. 3226 R. S. as a defense to a claim for restitution of said sums.

The decision of the Circuit Court of Appeals decides a Federal question in a way which is probably in conflict with the decisions of this court in *Bailey* v. *Glover*, 21 Wall. 342; 22 L. Ed. 636 and in *Kirby* v. *Lake Shore R. R. Co.*, 120 U. S. 130; 30 L. Ed. 569 in that denying any exception to Sec. 3226 R. S. it makes a statute which was designed to assist the Commissioner, a means of protecting him against his own fraudulent concealment of his falsification of a statute, and to make the statute of limitations, which was designed to prevent fraud, the means by which it is made successful and secure.

The case involves an important question of federal law, which has not, but should be decided by this court. This court has in several cases refused to grant an exception to Sec. 3226 R. S. In *Rock Island A. & L. R. R. Co.* v. *U. S.*, 254 U. S. 141, it required a technical compliance saying, "Men must turn square corners when they deal with the government", and that the words of the statute mark the conditions of the claimant's rights. *U. S.* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269. It has also held that the conditions of the statute may be waived by the commissioner and in *Tucker* v. *Alexander*, 275 U. S. 228, indicates that its construction may depend upon the insistence of the Commis-

sioner. It has also been held that the purpose of the statute is for the Commissioner's convenience and for his information. Nowhere has it ever been decided whether a court of equity should or could allow an exception where all of the facts were already within the knowledge of the Commissioner, and he had by his own fraud concealed them from the taxpayer until such time as he could claim the protection of Sec. 3226. Such question should be decided by this court, otherwise it leaves the way open for the Commissioner to legislate as he sees fit, and enforce such legislation in defiance of court decisions, with no remedy in the hands of the citizen by which he may recover.

The decision of the Circuit Court of Appeals decides a Federal question in a way which is probably in conflict with the decisions of this court in *Southern Pacific Company* v. *Bogert*, 250 U. S. 483; 63 L. Ed. 1099, and *Michaud et al* v. *Girod et al*, 4 How. 504, 561, 11 L. Ed. 1076, 1102 in that it holds that equity will not relieve because of the application of the theory of equity courts applying the analogy of the statute of limitations and giving no consideration to the circumstances of the case and the fact of actual fraud in which case this court has said that there can be found no case in the books where equity has failed to give relief.

The decision of the Circuit Court of Appeals decides a Federal question in a way which is probably in conflict with the spirit of the decision of this court in *Bull* v. *U. S.*, 295 U. S. 247, 261 in that it enables the United States to hold the money of an innocent party which has gone into the treasury by means of the fraud of their agent and the detention of which is immoral and amounts in law to a fraud on the taxpayer's rights.

The decision of the Circuit Court of Appeals decides

a Federal question in a way which is probably in conflict with the decision of this court in *Miller* v. *Standard Nut Margarine Co. of Florida,* 284 U. S. 498. This court there held that because of the exceptional and extraordinary circumstances surrounding the facts in the case, Sec. 3224 R. S. prohibiting the maintenance of any suit for the restraining of any tax did not apply. The peculiar facts in that case were the same as exist here and were that the Commissioner of Internal Revenue had knowingly enforced a statute which he had wilfully falsified and concealed the falsification by publishing it as a Regulation of his department and supplying it to all manufacturers of certain food products holding that they, under the falsified law were making oleomargarine. That business relied upon this statute and under it paid large sums into the treasury of the United States. When the falsification was finally discovered in 1929 suits were filed to restrain its further enforcement and injunctions issued by the District courts, which were ignored by the Commissioner. Claims for refund were filed and large sums returned, but in the case of Petitioner the provisions of Sec. 3226, were construed by the Commissioner to apply to sums paid in prior to 1925. When the first of these injunction cases reached this court it was held that the injunctions should be sustained, and that the lower court was correct in assuming equitable jurisdiction, notwithstanding the absolute provisions of Sec. 3224 R. S. Sec. 3224 and Sec. 3226 are part of the same legislation and have been held in *pari materia* and it is asserted by the Petitioner should both receive the same equitable construction, and that since this court held in the *Standard* case that because of the circumstances it constituted an exception to Sec. 3224 R. S. that they also constitute an exception to Sec. 3226 R. S. The court below refused to give an equitable construction to the statute and held that Petitioner could have no further relief since it had exhausted its legal remedies.

Conclusion.

The question here involved is not of interest merely to the Petitioner, but is of great interest to all taxpayers in their efforts to maintain their rights, and as a warning to officials that in their zeal to collect taxes they should not take the law into their own hands and usurp the functions of Congress and legislate as they thought the law should be, with the assurance that if the illegal acts were not discovered within a prescribed time the citizen could in no way assert his rights.

Prayer.

The Petitioner, the Dixie Margarine Company, prays that a Writ of Certiorari issue to review the decree of the Circuit Court of Appeals for the Sixth Circuit entered in this cause on December 1, 1943 (Rec. p. 25), (139 F. (2) 221), affirming the decree of the District Court for the Western District of Tennessee.

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IN THE

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OCTOBER TERM 1943.

NO.

THE DIXIE MARGARINE COMPANY,
Petitioner,

vs.

A. H. SHAEFER, Formerly Deputy Collector of Internal Revenue for the District of Tennessee,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below

The opinion of the Circuit Court of Appeals is reported at 139 F. (2) 221.

Jurisdiction.

The grounds on which the jurisdiction of this court is invoked are stated in the petition, page 2.

Statement.

A statement of the case has been set forth in the petition, page 3 and in the interest of brevity is not repeated here.

Statute Involved.

The statute involved, Sec. 3226 R. S. is cited and quoted in the petition, page 2.

Specifications of Error to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that Petitioner was not entitled to an equitable construction of Sec. 3226 R. S. and that that section was controlling and that there could be no exceptions to it, no matter what the circumstances were.

2. In holding that the Bill of Complaint did not sufficiently allege fraud to entitle the case to an equitable consideration.

3. In holding that the Bill of Complaint did not set out facts showing fraud and concealment sufficient to hold the Respondent a constructive trustee, and make the statute of limitations inapplicable.

4. In holding that a claim for refund is always a necessary prerequisite to suit.

5. In holding that by applying the analogy of the Statute of Limitations, Petitioner was barred by the lapse of time and that equity would not relieve.

Summary of Argument.

I. Congress could not have intended that there should be no exception to Sec. 3226 R. S. when by its literal construction it would be the means of protecting fraud and concealment, and allow one to profit by his own crime.

II. The court below refused to give equitable consideration to this case, holding, "But fraud cannot be averred in general terms and the complaint alleges no fraudulent conduct on the part of the defendant."

III. The Respondent by illegally taking and retaining the property of Petitioner, became a constructive trustee.

IV. Courts of equity are not bound by the Statutes of Limitations or compelled to apply the analogy of the Statute of Limitations where the circumstances are such as to constitute the Respondent a constructive trustee, and show him to be guilty of actual fraud.

ARGUMENT.

I. Congress could not have intended that there should be no exception to Sec. 3226 R. S. when by its literal construction it would be made the means of protecting fraud and concealment.

The Court below held that there could be no exception to Sec. 3226 R. S. and unless its terms are strictly complied with there can be no recovery. This holding is in conflict with all authorities on statutory construction which hold that legislative intent and meaning are to be the guide and should prevail over the letter of the statute. It is certain that in enacting Sec. 3226 a case as the one at bar could not have been in the minds of the law-makers, or as said by the Court in *Riggs* v. *Palmer*, 115 N. Y. 506:

> "If such a case had been present in their minds and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it."

Congress apparently never contemplated that a fraud would be committed by the Commissioner, but provided for cases of fraud by taxpayers by enacting Sec. 276 (a) of the Internal Revenue Code which provides that in the case of a false or fraudulent return the tax may be assessed or a proceeding in court for its collection may be begun without assessment at any time. The limitation statutes have no application in such cases. It cannot be presumed that Congress intended to protect the government against fraud by the tax-payer and leave the tax-payer without remedy against fraud by the Commissioner.

Courts deal with statutory construction perhaps more than with any other one subject of litigation, and the rules as to legislative intent are well established. Crawford, Statutory Construction, Sec. 177 summarizes them as follows:

> "Since the basic and underlying purpose of all legislation, at least in theory, is to promote justice it would seem that the effect of the statute should be of primary concern. * * * As a result the court should strive to avoid a construction which will tend to make the statute unjust (31 F. (2) 612) oppressive, (2 F. (2) 862) unreasonable, (31 F. (2) 612, 80 F. (2) 432) absurd, mischievous, or contrary to public interest. That construction should be accepted which will make the statute effective and productive of the most good, as it is presumed that these results were intended by the legislature."

The case of *Riggs* v. *Palmer,* Court of Appeals, N. Y. 1889, 115 N. Y. 506, 510, 22 N. E. 188, is an example of judicial construction giving exceptions to a statute where its strict construction would produce results never intended by the legislature. The court said:

> "Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view, * * * and in Smith's Commentaries, 814 many cases are mentioned where it was held that matters embraced in the general words of statutes, nevertheless, were not within the statutes, because it could not have been the intention of the law makers that they should be included.
>
> They were taken out of the statutes by an equitable construction and it is said in Bacon: 'By an equitable construction a case not within the letter of a statute is sometimes holden to be within the meaning because it is within the mischief for which a remedy is provided. * * * In some cases the letter of a legislative act is restrained by an equitable construction; in others it is enlarged; in others, the construction is contrary

> to the letter.' * * * In 1 Blackstone Commentaries, 91 the learned author, speaking of the construction of statutes, says: 'If there arise out of them any absurd consequences manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. * * * When some collateral matter arises out of the general words and happen to be unreasonable, then the judges are in decency to conclude that this consequence was not foreseen by the parliament, and, therefore they are at liberty to expound the statute by equity, and only *quod hoc* disregard it' * * * Besides, all laws, as well as all contracts, may be controlled by their operation and effect by general fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim on his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes."

It is difficult to believe that when Congress enacted Sec. 3226 R. S. it intended that no recovery should be had in the absence of a claim for refund in a case where the Commissioner himself knew he had no legal right to the money he was collecting, and the reason the tax-payer did not have that knowledge was because the Commissioner had caused a false statute to be promulgated, thus concealing the real law. The purpose and reason for Sec. 3226 are entirely absent. With a knowledge of its falsity, the Commissioner by coercion enforced the statute, denied claims filed, and defied injunctions issued by the lower courts in 1929, and only when rebuked by this court in 1932 desisted and refunded some of the money. The Petitioner's money had gone into the Treasury of the United States illegally, and its retention was a fraud, but protected by a literal con-

struction of Sec. 3226 the government still has possession of the money, and so far that possession has been upheld by the courts.

The court below relied upon the case of *Rock Island R. R.* v. *U. S.*, 254 U. S. 141; 65 L. Ed. 188, 41 S. C. 55, where the court used the expression, often since cited, that, "Men must turn square corners when they deal with the government". It appears that the converse of the rule should apply here and that it would be more equitable to say that the government should turn square corners with men, or as stated by Judge Barrett in *In re Blalock*, 31 F. (2) 612, "The construction must square with common sense and sound reasoning".

This court has repeatedly held that fraud and concealment constitute an exception to any statute of limitations. In *Rosenthal* v. *Walker*, 111 U. S. 185; 28 L. Ed. 395, 4 S. C. 382, it cites and approves *Bailey* v. *Glover*, 21 Wall. 342, 22 L. Ed. 636 and quotes from it as follows:

> "To hold that by concealing a fraud or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure."

Contrary to the example set by this court in the *Standard* case the court below failed and refused to give an equitable construction to a statute which it had already held to be in *pari materia* to the one in which this court gave equitable construction. *Hirst* v. *Gentsch*, 133 F. (2) 247.

Compliance with Sec. 3226 R. S. was prevented or at least made unlikely by the publication and enforcement of the falsified statute by the Commissioner.

Petitioner in 1929 began to suspect that vegetable oils were not included among the ingredients of oleomargarine as defined by law, and filed claim for refund. Those claims were promptly (and it is alleged in the complaint, fraudulently and illegally), rejected by the Commissioner, in 1929 and as late as 1931 so that it was not until 1932, the time of the decision of this court that it can be said that the fact of fraud became certain. In 1929 no claim could be filed nor a suit begun for the sums involved in this case because of the provisions of Sec. 3226 R. S. so that the filing of such claims would have been useless. True, the claim as filed did ask for the return of such other sums as were *legally* refundable, but the Commissioner and Court of Claims held that such amounts were not legally refundable without the filing of a claim. From 1932 to the time of the filing of this suit Petitioner was constantly engaged in litigation with the Bureau of Internal Revenue on some phase of this litigation. This Court has held that under such circumstances a litigant should not be charged with *laches*. *Southern Pacific R. R. Co.* v. *Bogert*, 250 U. S. 843; 63 L. Ed. 1099, 39 S. C. 533.

The general trend of opinions is that Courts of Equity interfere to prevent the bar of the Statute of Limitation where it would be inequitable or unjust to enforce it; and in no case is it better established that they will do so than where the party invoking the bar has perpetrated a fraud. As authority reference is made to:

Story Eq. Jur. Sec. 1521.

Booth v. *Warrington*, 4 Brown, Par. Cas. 163.

Bailey v. *Glover*, 88 U. S. 21 Wall 342; 22 L. Ed. 636.

Stearns v. *Page*, 48 U. S. 7 Howard, 819; 12 L. Ed. 928.

Prevost v. *Gratz,* 19 U. S. 6 Wheat. 491; 5 L. Ed. 311.

Moore v. *Greene,* 60 U. S. 19 Howard 69; 15 L. Ed. 533.

Rosenthal v. *Walker,* 111 U. S. 185; 28 L. Ed. 395.

It would appear that this is a case where traditional equitable principles should apply in full force. The wrong, for which there should be a remedy is openly admitted by the Revenue Department and has been accepted as a fact by every court that has considered it.

In considering this case on a motion to dismiss, the allegations must be taken as true. These allegations as set out in Par. 5 of the Bill charge that the Respondent told Petitioner that the products involved were oleomargarine, and that it was necessary for Petitioner to secure a license, and place stamps on the product, and that Petitioner was given a copy of Reg. No. 9, and told that the business must be conducted in compliance therewith. These allegations are not conclusions, but statements of fact, admitted by the motion to be true.

This court has held that the provisions of Sec. 3226 are not without exceptions, and that the strict requirements of the section may be waived by the Commissioner. In *Tucker* v. *Alexander,* 275 U. S. 228, 72 L. Ed. 253, 48 S. C. 45, the court said:

> "But no case appears to have held that such objection as that urged here may not be dispensed with by stipulation in open court on the trial. The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery."

It hardly seems likely that Congress intended that a statute which could be waived by the Commissioner himself must be so strictly construed by a court of equity as to protect the Commissioner against the results of his own fraud.

It is in interest of the public that the government should not be allowed to profit by, and become unjustly enriched by the fraud of its executive officers. If such instances are to be passed by with a mere injunctive decree restraining said officers from further proceeding with their illegal acts and frauds, and allow them to be protected in their concealment of the real law by allowing the retention of the proceeds of their fraud, it is really a sanction of such procedure rather than a deterrant. Such acts should be condemned and the money extorted returned to the rightful owners. As was said by Justice McReynolds, in *Goltra* v. *Weeks*, 271 U. S. 536, 70 L. Ed. 1074, 1082, 46 S. C. 613:

> "It is easy enough for us to smile at such stuff, but, unfortunately, the evil effects are not dissipated by gentle gestures. There should be condemnation forceful enough to prevent repetition so long as men have eyes to read."

II. The court below refused to give equitable consideration to this case, holding, "But fraud cannot be averred in general terms and the complaint alleges no fraudulent conduct upon the part of the defendant."

Petitioner asserts that notwithstanding the above statement by the court that every act with which the Respondent is charged in the complaint (Rec. pp. 3-4) was in fraud of Petitioner's rights. First, it alleges that he told Petitioner's President that the product that was being manufactured was oleomargarine, which was not true but was a misrepresentation; next, he told that party that he must

secure a license, which statement was untrue, and then that revenue stamps must be placed on the product, when he knew that such was not required by the real law, because under the real law the product was not oleomargarine. Then, by threats of imprisonment, fines and seizures coerced the illegal payments and concealed his frauds by giving that party a copy of Regulations No. 9 of the Bureau of Internal Revenue which contained the law as it had been falsified by the Commissioner, instead of the real statute, thus concealing the fraud for a long period of time.

This court has said that, "The unjust detention is immoral, and amounts in law to a fraud on the tax-payer's rights." *Bull* v. *U. S.*, 295 U. S. 247, 79 L. Ed. 1421, 55 S. C. 695. In this case there was not only an "Unjust detention", which according to this court's declaration, alone constitutes fraud, but also a fraudulent demanding, taking, and detention, as well as an intentional concealment of the fraud. True, the complaint does not keep repeating the words, "fraud" and "fraudulently" but the accepted rule of pleading does not require this. 12 R. C. L. 348 states the rule as follows:

> "The law has a standard for measuring intent, and declares illegal acts prejudicial to the rights of others to be frauds on those rights, although the parties are innocent of any intention to commit a fraud. (405) Equity may construct a fraud from the circumstances, whereas the law must find it as a fact. (417) It is not necessary to allege fraud in terms if the facts alleged are such as in themselves constitute fraud, or if facts are alleged from which fraud will be necessarily inferred or presumed, for the acts charged are not less fraudulent because the word 'fraud' or 'fraudulent' is not employed by the pleader in characterizing them. In other words, an allegation of facts from which the conclusion of fraud necessarily results is sufficient."

"The general trend of judicial opinion is set out in 37 C. J. (Sec.) Section 78 as follows:

> "It must be made to appear by the facts alleged, independent of mere conclusions, that, if the allegations are true, a fraud has been committed. (80) The charge may be sufficiently made by stating the facts from which fraud is necessarily implied. The term 'fraud' need not be used in the pleadings if facts are averred which show fraud as a conclusion of law."

In the court below the government argued that Petitioner should not have been deceived by the falsified law as published in the Regulations of the Commissioner and that Petitioner has as much access to the true statute as the government did. This court knows that throughout the United States an officer of the Bureau of Internal Revenue is held in very high regard, perhaps fear, and his statements are not questioned. Respondent held such a position and when he advised Petitioner and gave him a document which he stated was the law by which the business should be regulated, Petitioner had a right to rely upon it, and not be compelled to check it with the original statute. 12 R. C. L. 319 gives the general rule in this respect as follows:

> "General Rule.—The rule that fraud cannot be predicated on a failure to disclose facts where the information is as accessible to one party as to the other, and the truth may be ascertained by the exercise of reasonable diligence, does not justify a resort to active deceit or fraud, and hence does not apply where a party in addition to non-disclosure uses any artifice to throw the other party off his guard and to lull him into a false security. * * * The concealment becomes a fraud where it is effected by misleading or deceptive talk, acts or conduct, or is accompanied by misrepresentations, or where in addition to a party's silence there is any statement, word or act on his part which tends

> affirmatively to a suppression of the truth, or to a covering up or disguising of the truth, or to a withdrawal or distraction of a party's attention from the real facts; then the line is overstepped and the concealment becomes a fraud."

The acts of which the Petitioner here complains were designated by this court and the Circuit Court of Appeals in the *Miller* v. *Standard* cases (284 U. S. 498, 76 L. Ed. 422, 52 S. C. 260, 49 F. (2) 79) as being merely colorable, a frivolous pretense, in contemptuous disregard of court decisions, an administrative attempt to coerce the payment of money, so unsubstantial as to be frivolous, so arbitrary and capricious that it amounted to an administration fiat, without warrant, etc. Surely, combining all of these the conclusion must be that the acts were fraudulent, and should be sufficient to constitute an exception to Sec. 3226, following the precedent of the court where they were held to constitute an exception to Sec. 3224, the court saying:

> "We think it would be a manifest perversion of the statute in question to permit it to be made the means of enabling a tax official to obtain exemption from being restrained from enforcing an exaction which no legislation purports to provide for * * *" (49 F. (2) 79).

By the same reasoning can it not be said that it would be a perversion of Sec. 3226 to permit it to be made the means of enabling the retention of money the taking of which no legislation purported to provide for?

III. The Respondent by illegally taking and retaining the property of Petitioner, became a constructive trustee.

The court below held that, "The allegation that defendant is a 'constructive trustee' is only the conclusion of the pleader." It appears that the court in coming to this con-

clusion failed to give any consideration to the allegations of the complaint or to legal precedents. The words and directions of Respondent, in his position as an official of the Revenue Department was believed and relied on by the Petitioner. Respondent demanded, received and retained money to which he had no legal right. These facts are all alleged in the complaint, and this court recognized them as facts in the *Standard* case. With all of these facts before it the court had only to apply the well-known precedents as to when a party becomes a constructive trustee. These rules as briefly set out in Pomeroy's Eq. Jur. 5th. Ed. Vol. 4, Sec. 1047 are:

> "By the well settled doctrines of equity a constructive trust arises whenever one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain and withhold from another who is beneficially entitled to it; as, for example, when money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust. Sec. 1053: In general whenever the legal title to property, real or personal has been obtained through fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weaknesses or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain or enjoy the beneficial interest equity imposes a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same. * * *"

Wood on Limitations, p. 1010 sets out the rule as follows:

> "Where one by reason of his position or superior knowledge overreaches another so as to deprive him of his right to money, equity has exclusive jurisdiction in granting relief on the ground of a constructive trust

so that the right to relief will not be barred by the statute of limitations."

These principles as set out in the text books have repeatedly been affirmed by the courts which unanimously hold that courts of equity will interfere to prevent the bar of the Statute of Limitations where it would be inequitable or unjust to enforce it; and in no case is it better established that they will do so than where the party invoking the bar has perpetrated a fraud. Some of the many citations are: *Tabor* v. *Zenner*, 47 Ind. App. 165; *Jones* v. *Van Doren*, 130 U. S. 684, 691; *Payne* v. *Hook*, 74 U. S. 425; Storey Eq. Jur. Sec. 1521; *Bailey* v. *Glover*, 88 U. S. 347; *Rosenthal* v. *Walker*, 111 U. S. 185; Restatement of the Law, under the head of Restitution, Sections 75, 163.

There cannot be any claim but that the complaint alleges that the Respondent obtained money which did not belong to him, and that it did belong to Petitioner, and that its taking was by misrepresentations, duress, and fraud, and further that there was a concealment.

The case is so similar to a case decided by this court, that of *Ward* v. *Love County*, 253 U. S. 17; 64 L. Ed. 751, 40 S. C. 419, that Petitioner cannot refrain from calling attention to it. There the County had assessed exempt Indians, who, to avoid seizure paid the taxes under protest. This court said:

"The moneys thus collected were obtained by coercive means—by compulsion. The county and its officers reasonably could not have registered it otherwise. * * *

As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. It is a well settled rule that 'money got through im-

> position' may be recovered back; and, as this court has said on several occasions, 'the obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation', *Marsh* v. *Fulton County*, 10 Wall. 676, 684, 19 L. Ed. 1040; *Louisiana* v. *Wood*, 102 U. S. 294, 298, 299, 26 L. Ed. 153, 155; *Chapman* v. *Douglas County*, 107 U. S. 348, 355, 27 L. Ed. 378, 381. To say that the county could collect these unlawful taxes by coercive means, and not incur any obligation to pay them back, is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course, this would be in contravention of the fourteenth amendment which binds the county as an agency of the state."

This court in this case considered the County a trustee, saying:

> "In legal construction it received the money for the use and benefit of the claimants, and should respond to them accordingly."

IV. Courts of equity are not bound by the Statutes of Limitations or compelled to apply the analogy of the Statute of Limitations where the circumstances are such as to constitute the Respondent a Constructive Trustee and show him to be guilty of actual fraud.

Petitioner's rights having been concealed until after the running of the statutes as set out by Sec. 3226 it could not sue either upon a legal or equitable right within that time, yet the court below seemingly closed its eyes to an apparent and evident fraud and held, acting by analogy to the statute, equity would not relieve. It gave no consideration to those exceptional and extraordinary circumstances which so shocked this court and the lower courts

in the *Standard* cases. This court has repeatedly said that this must depend upon the circumstances. In *Michaud et al* v. *Giraud et al*, 4 Howard, 504, 561; 11 L. Ed. 1076, 1102, this court stated the rule as to analogy, then went further to explain that the circumstances must be the guide in every case and specifically stated the rule as to fraud. It is there said:

> "Although the statutes of limitations do not apply to any equitable demand, courts of equity adopt them; or at least take the same limitations for their guide, in cases analogous to those in which the statutes apply at law. (10 Ves. 467; 1 Cox 149.) Still, within what time a constructive trust will be barred must depend upon the circumstances of the case. (*Boone* v. *Chiles*, 10 Pet. 177.) There is no rule in equity which excludes the consideration of circumstances, and, in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the life time of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."

A case of peculiar similarity to the case here is that of *Southern Pacific R. R. Co.* v. *Bogert*, (1919) 250 U. S., 483, 63 L. Ed. 1099, 39 S. C. 533, where a reorganization agreement was dated Dec. 20, 1887; decree of foreclosure sale entered May 4, 1888; the sale made September 1888; and the stock in the new company delivered to the Southern Pacific Company in February 1891. The suit was begun on July 26, 1913. The claim was that the Southern Pacific Company received the stock of the new Houston Company as trustees for the stockholders of the old. The court said:

> "More than 22 years has then elapsed since the wrong complained of was committed. But, the essence of *laches* is not merely the lapse of time. It is es-

> sential that there be also acquiescence in the alleged wrong or lack of diligence in seeking a remedy. Here plaintiffs or others representing them protested as soon as the terms of the reorganization agreements were announced; and ever since they have with rare pertinency, and undaunted by failure, persisted in the diligent pursuit of a remedy. Nor does failure, long continued, to discover the appropriate remedy, though well known, establish *laches* where there has been due diligence, and as the lower courts have found, the defendant was not prejudiced by the delay."

In this case there has been no misleading silence on the part of the Petitioner, no acquiescence, there has been no injury to the Respondent, no records have disappeared, no witnesses died, nor has there ever been a denial of the illegal receipt or retention of the money by the Government.

CONCLUSION.

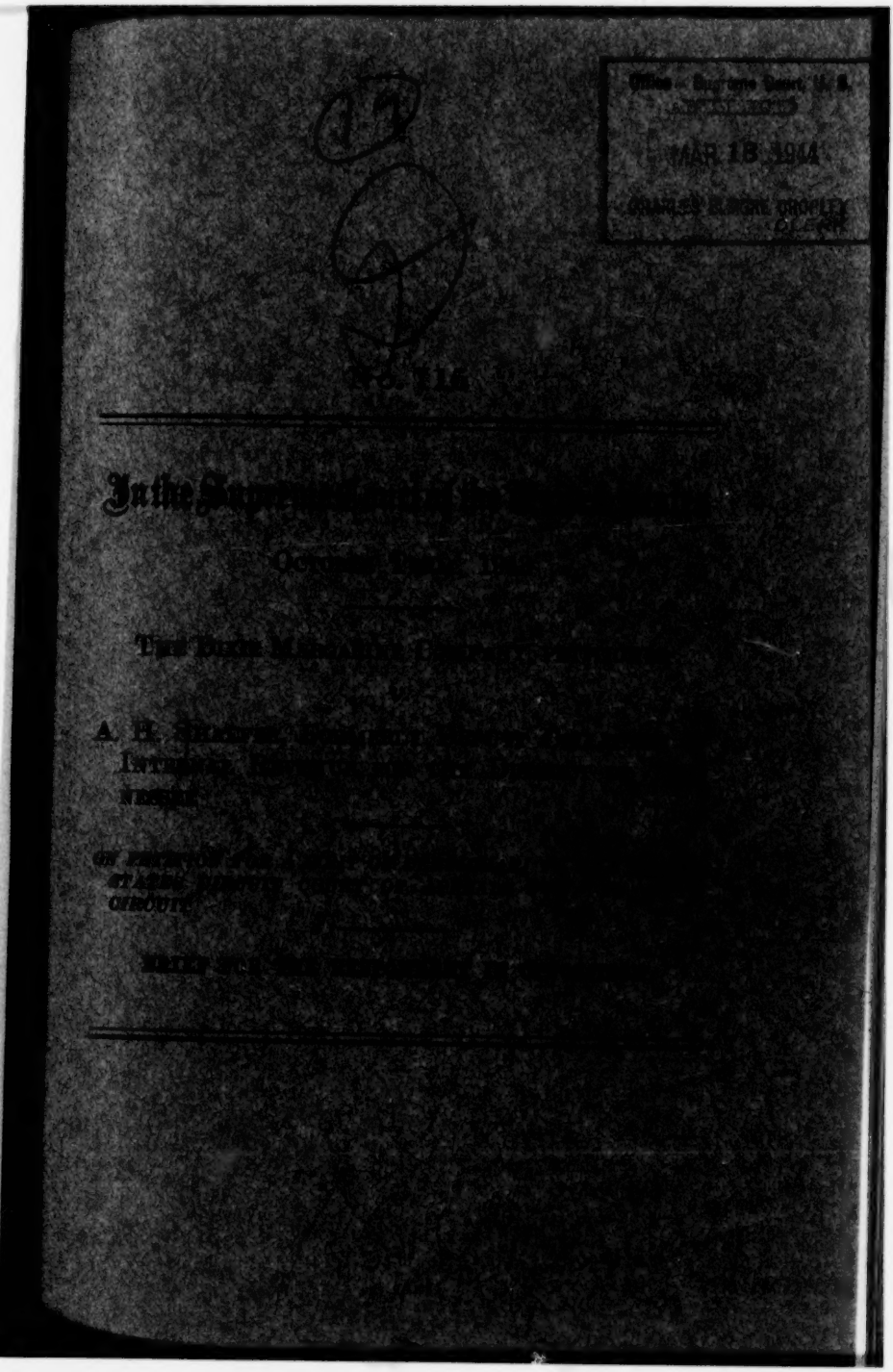
It is respectfully submitted that writ of certiorari should be issued.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 715

THE DIXIE MARGARINE COMPANY, PETITIONER

v.

A. H. SHAEFER, FORMERLY DEPUTY COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF TENNESSEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 26–33) is reported in 139 F. 2d 221.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 1, 1943 (R. 25). The petition for writ of certiorari was filed February 18, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in view of Section 3772 of the Internal Revenue Code, the District Court had jurisdiction over a suit for refund instituted in 1942 for taxes paid between 1923 and 1925, when no application for refund of such taxes was ever filed.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 3772. SUITS FOR REFUND. (formerly R. S. 3226)
>
> (a) *Limitations.*—
>
> (1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.
>
> (2) *Time.*—No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallow-

ance of the part of the claim to which such suit or proceeding relates. * * * (26 U. S. C., Sec. 3772.)

STATEMENT

The taxpayer filed a complaint in the United States District Court for the Western District of Tennessee for the recovery of federal excise taxes paid under the Oleomargarine Act of August 2, 1886, c. 840, 24 Stat. 209, Sec. 3, as amended by the Act of May 9, 1902, c. 784, 32 Stat. 193, Sec. 2. The allegations of the complaint are that taxpayer is a Tennessee corporation with its principal place of business in Memphis, Tennessee, and that A. E. Shaefer is a resident of Memphis, Tennessee, and was Deputy Collector of Internal Revenue for the District of Tennessee in charge of the sale of federal revenue stamps from January 1, 1923, to December 1, 1925 (R. 2). It is alleged that taxpayer was, during the period here involved, engaged in the manufacture and sale of a food product commonly known as oleomargarine. Further, that the taxpayer before beginning the manufacture of oleomargarine inquired of and was advised by the office of the Collector of Internal Revenue that the product which it contemplated manufacturing would be subject to the oleomargarine tax. (R. 3.) The complaint alleges that the taxpayer began the manufacture of the product, commonly known as oleomargarine, in March 1923 and paid the federal excise tax to July 1931 in the amount of $329,231.64;

that a claim for refund in the amount of $241,819.64 was filed November 30, 1929, which claim was rejected December 26, 1929; that a second claim for refund was filed September 14, 1931, covering the period from December 1, 1925, to July 1931; that the claims were first rejected and that after the decision of this Court in *Miller* v. *Nut Margarine Co.*, 284 U. S. 498, the claims were reopened and paid on April 7, 1932. The taxpayer also alleges that the claim for refund filed November 30, 1929, and the subsequent claim filed September 14, 1931, related to the taxes paid subsequent to December 1, 1925, and that the tax amounting to $87,412 paid prior to December 1, 1925, was not refunded. It is alleged that the taxpayer instituted a suit for the recovery of the excise tax paid prior to December 1, 1925, in the United States Court of Claims and further that on November 4, 1935, that court sustained a demurrer filed by the United States and the complaint was dismissed.[1] (R. 4–6.) The taxpayer alleged in its amendment to the complaint in this case that A. E. Shaefer fraudulently represented to the taxpayer that its product was taxable as oleomargarine (R. 9).

The District Court sustained A. E. Shaefer's motion to dismiss, and the complaint was dismissed December 7, 1942 (R. 15). Upon appeal

[1] *Dixie Margarine Co.* v. *United States*, 12 F. Supp. 543, certiorari denied, 297 U. S. 713.

the court below affirmed the judgment of the District Court on December 1, 1943 (R. 25).

ARGUMENT

We think the decision below is correct in that the District Court did not have jurisdiction. No claim for refund was ever filed as required under R. S. 3226, now I. R. C. 3772.[2] It is well settled that the filing of a claim for refund is a necessary prerequisite to a suit for the recovery of internal revenue taxes. *Savings Institution* v. *Blair,* 116 U. S. 200; *United States* v. *Felt & Tarrant Co.,* 283 U. S. 269; *Tucker* v. *Alexander,* 275 U. S. 228; *Maryland Casualty Co.* v. *United States,* 251 U. S. 342; *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62. Taxpayer has cited no case to the contrary. In an earlier case involving the identical taxes the United States Court of Claims held that it did not have jurisdiction. *Dixie Margarine Co.* v. *United States,* 12 F. Supp. 543, certiorari denied, 297 U. S. 713.[3] There have been no decisions since the denial of certiorari in that case which touch upon the problem.

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[2] Under R. S. 3228 (now I. R. C. 3313) such claims were required to be filed within four years after the date of payment of the tax.

[3] This decision of the Court of Claims, in a suit by petitioner against the United States for the recovery of the identical taxes, is also *res judicata* against petitioner. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 402–403, and cases cited. The Circuit Court of Appeals did not find it necessary to determine that question, but the point was raised by the motion to dismiss the complaint (R. 13).

This Court in *Miller* v. *Nut Margarine Co.*, 284 U. S. 498, a case relied upon by taxpayer, decided, over a strong dissent, that the collection of internal revenue taxes would be enjoined under certain circumstances. The injunction was sustained in that case, notwithstanding the provisions of Section 3224 of the Revised Statutes providing that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court", on the basis that the collection would, under the circumstances of that case, cause irrevocable injury. That decision is limited to Section 3224 of the Revised Statutes and should not be extended to other situations, as contended here. This taxpayer was advised prior to the time it began manufacturing that its product would be taxed. The taxes here involved were paid and would have been refunded had a timely claim been filed. The reason given in the *Nut Margarine* case, *supra,* for enjoining the *collection* of a tax could under no circumstances apply to suits for refund. Petitioner's attempt to convert a simple suit for refund of taxes into an action in equity for the establishment of a constructive trust does not change the nature of the proceeding or make the statutory provisions inapplicable.

The court below correctly stated in its opinion (R. 31) that the allegations of the complaint definitely show that respondent was entirely innocent of any acts of fraud, and the cited cases dealing with situations where fraud existed are

clearly inapplicable. There is no decision which supports the taxpayer's claim.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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